TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1897.

No. 470.

GEORGE J. CROSSLEY (PETITIONER ON BEHALF OF SALTER D. WORDEN) AND SALTER D. WORDEN, APPELLANTS,

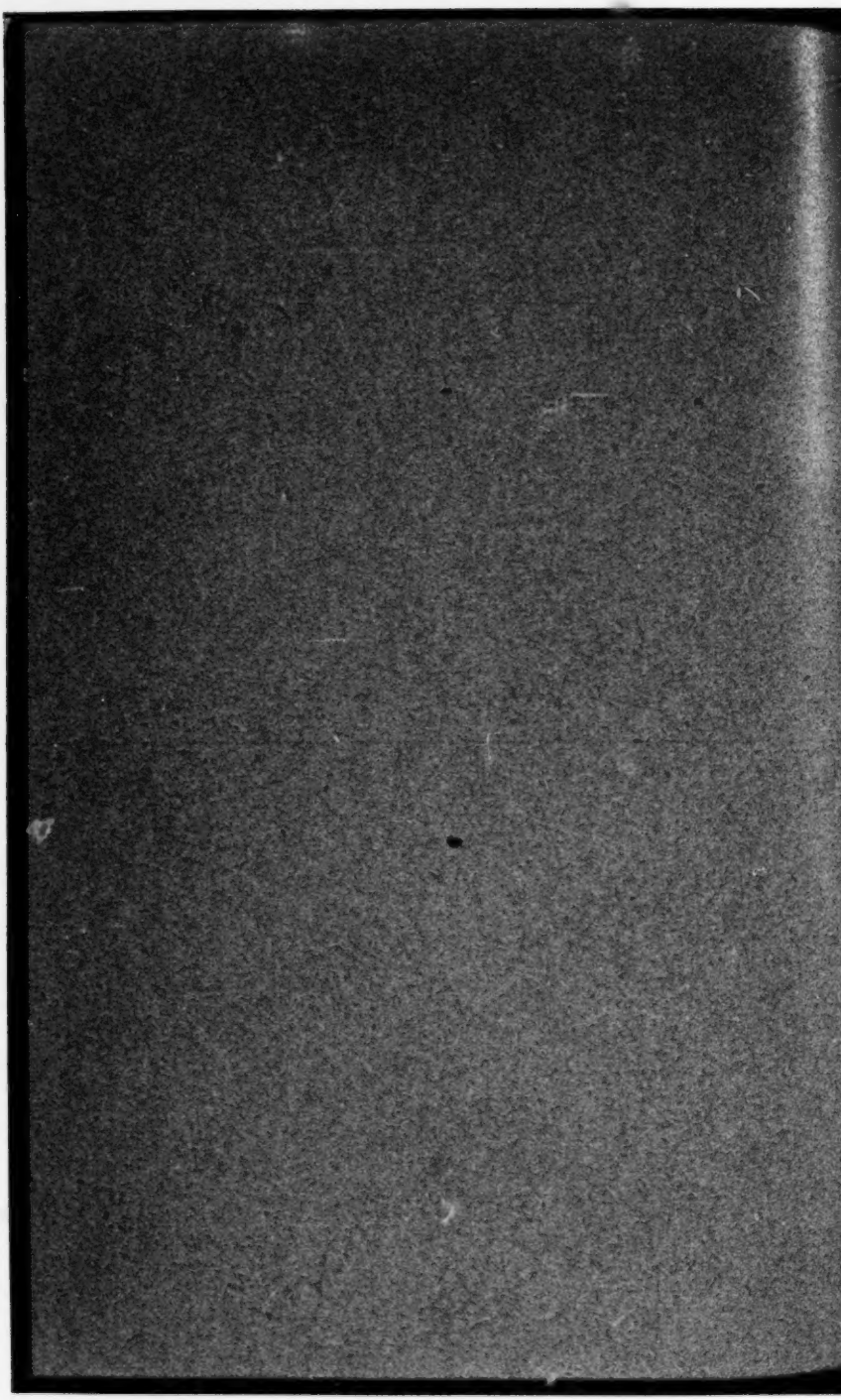
vs.

THE STATE OF CALIFORNIA AND CHARLES AULL, WARDEN OF THE STATE PRISON OF THE STATE OF CALIFORNIA.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF CALIFORNIA.

FILED OCTOBER 9, 1897.

(16,683.)



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THE STATE OF CALIFORNIA AND CHARLES AULL, WARDEN OF THE STATE PRISON OF THE STATE OF CALIFORNIA.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF CALIFORNIA.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., NOVEMBER 20, 1897.

1 *Petition and Complaint for Writ of Habeas Corpus.*

In the Circuit Court of the United States of the Northern District of California.

In the Matter of SALTER D. WORDEN (on *Habeas Corpus*). No. 12381.

Now comes George J. Crossley, on behalf of Salter D. Worden, and by this his verified petition respectfully represents and shows—

That the said Salter D. Worden is unlawfully and illegally restrained of his liberty by Charles Aull, the warden of the State prison of the State of California at Folsom, in the county of Sacramento and State of California, at said State prison at Folsom aforesaid and within the northern district of the State of California.

That said Worden is now and at all times herein mentioned was a citizen of the United States and a citizen of the State of California, and so is and was at all times a person within and subject to the jurisdiction and laws of the State of California; that the said Worden has by the State of California, and while within its jurisdiction and subject to its laws, been deprived of his liberty without due process of law, and that the said Worden has also by the State of California, and while within its jurisdiction and subject to its laws, been denied the equal protection of its laws, all contrary to and in actual violation of the rights of the said Worden as a citizen of the

2 United States that are secured to him by the laws of the United States and by the fifth and fourteenth amendments to the Constitution of the United States, and all in contravention of the provisions of the laws and the Constitution accordingly as amended and in force.

That the said State of California, by its laws in force and effect at all times herein mentioned, provides that—

"All murder which is perpetrated by means of poison or lying in wait, torture, or by any other kind of wilful, deliberate, and premeditated killing, or which is committed in the perpetration or attempt to perpetrate arson, rape, robbery, burglary, or mayhem, is murder in the first degree, and all other kinds of murder is of the second degree;"

And that the punishment for murder in the first degree shall be that—

"Every person guilty of murder in the first degree shall suffer death or confinement in the State prison for life, at the direction of the jury trying the same, or upon a plea of guilty, the court shall determine the same, and every person guilty of murder in the second degree is punishable by imprisonment in the State prison not less than ten years."

That by the provisions of the constitution and laws of said State of California the jury in all criminal cases is the exclusive judge of the degree of the crime, including all cases of murder or manslaughter; that by reason of the laws of said State it is the duty of

the court upon a trial for murder to submit the question of the degree of the crime to the jury and to permit the jury to have sole determination thereof; that the constitution and laws of said
3 State, as aforesaid, were in force at all times herein mentioned.

That upon September 20th, 1894, said State of California caused an information to be filed in its superior court of the county of Yolo therein, and within said northern district of the State of California, charging that the said Worden did, on or about the eleventh day of July, 1894, in the county of Yolo, in the State of California, then and there being, did wilfully, unlawfully, feloniously, and of his malice aforethought kill and murder a human being, Samuel C. Clark, but that upon the second day of October, 1894, the said Worden was arraigned in said superior court upon said charge and pleaded not guilty; that upon October seventeenth, 1894, said Worden appeared in said superior court, said cause was called for trial, proceeded, a jury was impanelled and sworn to try the case, and said trial continued from day to day until and including the ninth day of November, 1894, upon which day the jury rendered a verdict finding the said Worden "guilty of murder in the first degree;" that thereafter and upon the sixteenth day of November, 1894, and upon said verdict the said superior court of said State of California in and for said county of Yolo rendered judgment, wherein said Worden was adjudged guilty of murder in the first degree and by the order of said court committed, and pursuant to said order thereafter delivered into the custody of the said Charles Aull, warden of the State prison, to be kept in close confinement until thereafter said Worden should be hung by the neck until dead, and that said Worden is now in the custody of said Aull; that
4 thereafter the time when said Worden should be so hanged, as aforesaid, was fixed and set for Friday, the 4th day of June, 1897; that by reason of said judgment and the order of said court, as aforesaid, the said Worden is by the said Charles Aull unlawfully and illegally restrained of his liberty and imprisoned.

That the said verdict, judgment, and the order of said court whereby said Worden is restrained and imprisoned, as aforesaid, are wholly void, illegal, and unlawful; that the same has been without due process of law and because said Worden has by said State of California been denied the equal protection of its laws, and in this behalf the said petitioner shows that the evidence upon which said verdict so rendered, together with the charge and instructions of the said superior court, has been incorporated in a bill of exceptions, and is of record in said court and is part of the record of said action, of which said verdict and judgment are also a part; that it appears from the record of the said court in said cause, as aforesaid, that said court had no jurisdiction to render such judgment because the fact of record, as aforesaid, shows without contradiction that Worden, with others, on the eleventh day of July, 1894, so injured the track of that part of the Southern Pacific railroad that lies between Broderick and Davisville that some time after Worden had left and gone some miles away from the

place of injury an engine and train of cars, while passing over said track between Broderick and Davisville, when it reached the place of said injury thereto and by reason thereof was de-
5 railed and the engine was precipitated into a swamp or slough in such manner that said precipitation caused the death of said Samuel C. Clark at a time when said evidence shows that Worden was and had been for some time one or more miles away from the point where the said derailment occurred, and that none of the other persons who were charged with him were anywhere in the vicinity at that time; that there was no evidence whatever upon said trial, as affirmatively appears on said record, that it was the purpose of said Worden, or of any one acting with him, to cause the death of the said Clark, or that said Worden or that any of them knew or expected or believed that said Clark would be killed by reason of the injury done to the track, as aforesaid, and that said charge of murder, as appears on said record, was wholly upon and evidenced because that by reason of the wrongful act of said Worden and those with him in injuring said track said train became derailed, precipitating said engine, as aforesaid, whereby said Clark was killed, it being merely assumed by the State that by implication of law from the fact of the commission of said wrongful act in injuring said track which subsequently caused the death of said Clark and not by any evidence whatever either showing or tending to show that said Worden ever manifested any express or definite purpose to take the life of said Clark, or that the same had been manifested or expressed by any of those charged with him.

That there was no evidence before said jury on said trial, as appears by said record, either showing or tending to show that said kill-
ing of said Clark was perpetrated by means of poison, or by
6 lying in wait, or by torture, or by any other kind of wilful deliberate, and premeditated killing, or was committed in the perpetration of or attempt to perpetrate arson, rape, robbery, burglary, or mayhem; that said evidence, as appears in said record, only shows or tends to show that said Worden was guilty at most, if of any unlawful homicide, of murder in the second degree under the laws of said State, there being no evidence of any premeditated purpose to kill.

That said State of California, through its said superior court, only submitted to said jury the question as to whether or not Worden was guilty of murder in the first degree, and would not and did not permit said jury to determine the question of the degree of murder therein, or to find the said Worden guilty of murder in the second degree; that there was no evidence whatever before said jury, as appears in said record, that either defendant or any of those charged with him were guilty of murder in the first degree, and by reason of the failure and refusal of the said State of California, acting by and through its said superior court, to permit said jury to determine the degree of the crime or to render a verdict of murder in the second degree, as aforesaid, which, by its constitution and laws now and then in force, it is exclusively the province of said jury to determine, and which determination is, in all other cases in said

State, under said constitution and laws, as aforesaid, left to the sole determination of the jury, and said Worden, in contravention of the Constitution of the United States as amended, as aforesaid, has been deprived and is now being deprived by said State of California of his liberty without due process of law, and has by said State been denied the equal protection of its laws, as aforesaid, all
7 within the meaning of the said Constitution of the United States as amended, as aforesaid.

That Worden has appealed to the supreme court of said State and has applied to the governor of said State to be relieved of said judgment, as he is entitled to be under its laws, and has tried in all possible manner to have said State restore to him his rights under the Constitution of the United States, as aforesaid, and to be released from such restraint and imprisonment, and has demanded of said Aull that he be so released; but all said appeals, applications, and demands have been denied, and said Worden is by said State denied any remedy or means whatever whereby he can be relieved from the operation of said unlawful judgment and released from said unlawful and illegal imprisonment and restraint of his liberty on the part of said Aull, as aforesaid, and that he has no plain, speedy, or adequate remedy, either at law or otherwise, under the laws of said State at all.

That said Worden is a citizen of the United States and the State of California and a resident of said northern district, and, being such citizen and resident, he claims that he is entitled to the protection of this court to secure him against being deprived by said State of California of his liberty and his life without due process of law, as aforesaid, and to prevent his being denied by said State of California the equal protection of its laws, as aforesaid, which is against and in contravention of the provisions of the Constitution of the United States and the amendments thereof, as aforesaid, and which is violated by the aforesaid imprisonment and re-
8 straint of the liberty of said Worden by the said Aull, as aforesaid.

Furtherm re, this petitioner in behalf of the said Salter D. Worden sho s that as further cause and reason why the said imprisonment and restraint of the said Worden is illegal and unlawful that it appears from the record in the said superior court of the said State of California in and for said county of Yolo that the train of cars of which said Samuel C. Clark was the engineer, and that was derailed as hereinbefore stated, was not a regular freight or passenger train of the corporation, Southern Pacific Company, operating said piece of railroad above described, but was in truth and in fact a special train; that, aside from its necessary crew of employés who were conducting the same, consisting of said Clark as engineer, of a fireman, a conductor, two brakemen, twenty-two United States soldiers, and one other person, *and that* there was upon said train a considerable amount of United States mail which had been delayed in transmission, and that the effect of the derailment of said train, as appears from said record, constituted an obstruction or stopping of the transmission of United States mail, and was a restraint and

retarding of the interstate commerce of the United States—that is to say, the commerce carried on between the State of California and other States of the Union—and that by reason thereof it appears from said record that the offense committed by said Worden was, if anything, an offense against the laws of the United States and in contravention of the laws of the United States, and particularly of sections 5440 and 3995 of the Revised Statutes of the United States and of an act of Congress of July 2, 1890,
9 entitled "An act to prevent trusts and monopolies;" that, as appears by said record, in the trial of said cause the State of California, through its said superior court of said county of Yolo, assumed to try and did try the said Worden for an offense or by reason of an offense made solely punishable by the laws of the United States; that, as appears in said record, there was no evidence that the said Worden or any of those charged with him had either wilfully or with deliberation or with premeditation undertaken to cause the death of the said Samuel C. Clark; that in said record it appears that there was no evidence whatever of any specific or actual purpose on the part of the said Worden or of any of those charged with him to take the life of the said Clark or the life of any other person, and that the only kind of murder, under the laws of the State of California, that from said record is in anywise shown or could be assumed to be shown would be that murder which is due to the fact that by the commission of a felony the death of a person results, that though not actually intended was nevertheless the consequential result of the commission of an act amounting to a felony under the laws of said State; that it does not appear from the evidence contained in said record that the act of the said Worden and those charged with him in so injuring the track of said railroad, as aforesaid, was of such a nature or committed under such circumstances and with such purpose or intent that it was or could have been a felony under the laws of the State of California, but, on the contrary, it appears from said record that the purpose and object of the said Worden in the commission of said act was the
10 commission of a crime or offense against the laws of the United States and in contravention of its statutes.

That it appears from said record that the city of Sacramento and the vicinity thereof about that time was under the control of the military authorities of the United States, and that they at that time had charge and control of the train of cars that was derailed, and that such train was exclusively engaged in the carrying or transportation of the mail of the United States and the soldiers of the United States guarding the same and under the command of Colonel William M. Graham, of the United States Army, who at that time was acting under and pursuant to orders of the President of the United States, and that such train was not engaged for any other purpose at that time; that therefore it appears affirmatively from said record that the offense committed, if any offense was committed by the said Worden, was solely cognizable in the courts of the United States, who had and have exclusive jurisdiction thereof, and that in the trial and conviction of the said Worden, as afore-

said, the State of California, acting through its superior court in and for said Yolo county, as aforesaid, has assumed and undertaken to cause the warden of its State prison to so unlawfully and illegally restrain and imprison the said Worden and keep him in custody for the purpose of taking the life of the said Worden by causing him to be hanged until he is dead.

Therefore petitioner prays, on behalf of said Worden, a writ of *habeas corpus* issue out of this court, directed to the said
11 Charles Aull, the warden as aforesaid, commanding him that he have and produce before this court, at such time and in such manner as the court shall deem proper, the body of the said Salter D. Worden, together with the terms and causes of his detention and imprisonment; that said imprisonment be adjudged illegal and unlawful, and that said Salter D. Worden be discharged from said imprisonment; and, further, that in order that the court may do justice in the premises that the court direct, as ancilliary, to said writ of *habeas corpus*, that there be issued out of this court and directed to the superior court of said State of California in and for said county of Yolo a writ of certiorari, commanding said court to certify and to cause to be produced at the hearing upon said matter of *habeas corpus* a full, true, and correct transcript of the record and proceedings of said court in the said cause, which is known therein as "The People of the State of California *vs.* S. D. Worden *et al.*," in order that upon the hearing of the matter of said *habeas corpus* that this court may fully determine the true cause and nature of said imprisonment, and in furtherance of justice cause that to be done which ought to be done; and for such other and further relief as may be proper in the premises.

And, furthermore, this petitioner avers upon his information and belief that it is the purpose of the said Charles Aull, warden as aforesaid, to execute the said Worden upon Friday, the 4th day of June, 1897, and that it is therefore necessary that a writ of *habeas corpus*, if issued out of this court, be in the form of a writ of *habeas corpus cum causa*, requiring the marshal to whom the service
12 of the same shall be directed or entrusted at the time of making such service to take possession of the body of the said Salter D. Worden and keep him in custody, and produce him before the court at such time as the court may direct, and hold him subject to the order of this court.

And this petitioner now makes this application, as hereinbefore appears, at the request of the said Worden and in his behalf, and because the said Worden is now confined, as aforesaid, in the State prison at Folsom, in the county of Sacramento, in the State of California, more than one hundred miles distant from this city of San Francisco.

GEORGE J. CROSSLEY,
Petitioner, in Behalf of Salter D. Worden.

GEO. W. MONTEITH,
Attorney for Petitioner and for said Salter D. Worden.

Subscribed and sworn to before me this 3d day of June, 1897, by George J. Crossley.

W. J. COSTIGAN,
Commissioner U. S. Circuit Court,
Northern District of California.

(Endorsed:) Filed June 3d. W. J. Costigan, clerk.

13 At a stated term, to wit, the March term, A. D. 1897, of the circuit court of the United States of America of the ninth judicial circuit in and for the northern district of California, held at the court-room, in the city and county of San Francisco, on Thursday, the 3rd day of June, in the year of our Lord one thousand eight hundred and ninety-seven.

Present: Honorable William B. Gilbert, circuit judge.

In the Matter of SALTER D. WORDEN, on *Habeas Corpus.* No. 12381.

Order Denying Writ of Habeas Corpus and Dismissing Petition.

In this matter the petition on behalf of Salter D. Worden came on regularly for hearing, Geo. W. Monteith and J. Taylor Rogers, Esqs., appearing on behalf of said petitioner. After argument of counsel duly heard and considered it was ordered that said application for a writ of *habeas corpus* be, and is hereby, denied and the petition therefor dismissed. To the making of the foregoing order said counsel made application for and was allowed an exception.

14 At a stated term, to wit, the March term, A. D. 1897, of the circuit court of the United States of America of the ninth judicial circuit in and for the northern district of California, held at the court-room, in the city and county of San Francisco, on Thursday, the 3rd day of June, in the year of our Lord one thousand eight hundred and ninety-seven.

Present: Honorable William B. Gilbert, circuit judge.

In the Matter of SALTER D. WORDEN, on *Habeas Corpus.* No. 12381.

Order Denying Motion for Issuance of Writ of Supersedeas.

Ordered that the motion for issuance of writ of supersedeas herein be, and is hereby, denied. To the making of the foregoing order counsel for petitioner asked for and was allowed an exception.

15 *Notice of Appeal.*

In the Circuit Court of the United States in and for the Northern District of California.

In the Matter of SALTER D. WORDEN, on *Habeas Corpus.*

The petitioner and Salter D. Worden, feeling themselves aggrieved by the order heretofore entered and made in the circuit court of the

United States in and for the northern district of California, on the first day of June, 1897, denying the application of petitioner on behalf of the said Salter D. Worden for a writ of *habeas corpus*, as prayed for in the petition therefor herein and dismissing the petition therein, do hereby appeal from said order of said circuit court to the Supreme Court of the United States, and prays that a transcript of the records and proceedings and papers upon which said order was made, duly authenticated, may be sent to the Supreme Court of the United States.

Dated at San Francisco, Cal., June 3rd, 1897.

GEO. W. MONTEITH,
Attorney for Petitioner and for said Salter D. Worden.

(Endorsed:) Received copy of the within notice of appeal this 3d day of June, 1897. W. F. Fitzgerald, att'y general of California, by Henry E. Carter, dep. att'y general. Filed June 3d, 1897. W. J. Costigan, clerk.

16 In the Supreme Court of the United States of America.

In the Matter of the Petition of SALTER D. WORDEN, on *Habeas Corpus.*

GEORGE J. CROSSLEY and SALTER D. WORDEN, Appellants and Plaintiffs in Error,
vs.
THE STATE OF CALIFORNIA and CHARLES AULL, Warden of the State Prison of the State of California, Respondents and Defendants in Error.

Assignment of Errors.

And now, to wit, on this 3rd day of June, 1897, George J. Crossley, petitioner, and Salter D. Worden, above-named appellants and and plaintiffs in error, come by Geo. W. Montieth, their attorney, and say that in the record and proceedings of the above-entitled matter there is manifest error, in this, to wit:

1st. The circuit court of the United States in and for the northern district of California erred in denying the application on behalf of the said Salter D. Worden for a writ of *habeas corpus*, as prayed for in the petition herein, in the matter of said application in *in* said court and in dismissing the petition therefor, because it appears by the record and in said petition, from the facts therein alleged and shown, that the said Salter D. Worden is restrained of his liberty and is in custody without due process of law, within the meaning of the 5th and 14th amendments to the Constitution of the United States.

2nd. That said circuit court erred in denying the application for a writ of *habeas corpus* and in dismissing the petition therefor, as aforesaid, because it appears by the record that the said petition for the writ of *habeas corpus* aforesaid sufficiently shows that the said Salter D. Worden is by the State of California deprived of his

liberty without due process of law, within the meaning of the 5th and 14th amendments of the Constitution of the United States, in the restraint and imprisonment of the said petitioner set forth and appearing.

17 3rd. That said circuit court erred in denying the application for a writ of *habeas corpus* and dismissing the petition therefor, as aforesaid, because it appears by the record that the petition for a writ of *habeas corpus* aforesaid sufficiently shows that the said Salter D. Worden is by the said State of California being deprived of his liberty, and upon the 4th day of June, 1897, will be deprived of his life by reason of his having been placed in the unlawful custody and being under the unlawful restraint and imprisonment of the said Charles Aull, at the State prison of the State of California, without due process of law, within the meaning of the 14th amendment of the Constitution of the United States.

4th. That the said circuit court erred in denying the application for a writ of *habeas corpus* aforesaid and in dismissing the petition therefor, because it appears by record that the petition for said writ of *habeas corpus* aforesaid sufficiently shows that the State of California has denied to the petitioner, a person within its jurisdiction, the equal protection of its laws within the meaning of the 14th amendment of the Constitution of the United States.

5th. That the circuit court erred in denying the applicatian for a writ of *habeas corpus* aforesaid and in dismissing the petition therefor, because it shows by record that the petition for said writ of *habeas corpus* aforesaid sufficiently shows that restraint and imprisonment of said Salter D. Worden, as set forth in said petition, are due to the fact that the said State of California has deprived said Salter D. Worden of his liberty and is about to deprive him of his life, and has denied him an equal protection of its laws, contrary to the form, force, and effect of the statutes of the United States and of the Constitution of the United States and in violation of the constitutional rights of the said Salter D. Worden.

6th. The said circuit court erred in denying the application for the writ of *habeas corpus* and dismissing the petition therefor, as aforesaid, because it appears by the record that the petition for *habeas corpus* aforesaid sufficiently shows and is cause for the granting and issuance of the writ of *habeas corpus* therein prayed for under the laws *of* the Constitution of the United States; that the denial thereof was in contravention of *its* statutes of the United States in such cases made and provided and of the Constitution of the United States.

7th. That said circuit court erred in denying the application for the writ of *habeas corpus* aforesaid *in* dismissing the petition thereof, because it appears by the record that said petition shows that the offense committed by the said Worden was solely an offense under the laws of the United States, and that *from* that reason it appears from the record that the State of California, through its courts, had not jurisdiction of either the said Slater D. Worden or of the subject-matter of the cause wherein he was convicted, as appears in said petition.

8th. That said circuit court erred in denying the application for the writ of *habeas corpus* aforesaid and in dismissing the petition therefor, because it appears by the record that at the — of the commission of the alleged offense the premises and the place where it was committed *was* wholly under the custody and control and entirely within the jurisdiction of the military authorities of the United States, acting under and pursuant to the orders and directions of the President of the United States, and that the laws of the State of California were at that time, with reference to the matters
18 set forth, inoperative and suspended and the entire jurisdiction within the authority of the United States and of its courts, and that the State of California and its courts were wholly without jurisdiction to act in the premises.

9th. The said circuit court erred in denying the application for the writ of *habeas corpus* and in dismissing the petition therefor, as aforesaid, because it appears by the record that the petition for the writ of *habeas corpus* aforesaid sufficiently shows that the State of California and its courts had no jurisdiction whatever in the premises, and that the case complained —, if anything, were in defiance of the law and authority of the United States, and that all matters connected therewith belonged exclusively to the jurisdiction of the United States or of its courts.

Wherefore the said appellants and plaintiffs in error pray that the order of the circuit court in and for the northern district of California, entered upon the 3rd day of June, 1897, denying the said application of said petitioner on behalf of Salter D. Worden for the writ of *habeas corpus* therein prayed for and dismissing said petition be reversed, and that said circuit court be ordered to vacate said order and to grant and issue said writ of *habeas corpus*, as prayed for in the petition, together with the ancilliary process therein sought, in order that the unlawful restraint and imprisonment of the said petitioner and of the deprivation by the State of California of the said Salter D. Worden's liberty by the State of California and by the said Charles Aull and by the denial of the said State of California to said Salter D. Worden, a person within its jurisdiction aforesaid, of the equal protection of its laws, as in said petition appears, may be inquired into, and that if unlawful, as alleged, that the said petitioner may be discharged.

Dated San Francisco, June 3rd, 1897.

GEO. W. MONTEITH,
Att'y for Geo. J. Crossley and Salter D. Worden,
Appellants and Plaintiffs in Error.
J. G. MAGUIRE,
Also Appearing as Attorney for Appellants
and Plaintiffs in Error.

(Endorsed:) Received a copy of the within assignment this June 3rd, 1897. W. F. Fitzgerald, attorney gen. of California, by Henry E. Coster, dep. att'y general. Filed June 3, 1897. W. J. Costigan, clerk.

19 At a stated term, to wit, the March term, A. D. 1897, of the circuit court of the United States of America of the ninth judicial circuit in and for the northern district of California, held at the court-room, in the city and county of San Francisco, on Thursday, the 3rd day of June, in the year of our Lord one thousand eight hundred and ninety-seven.

Present: Honorable William B. Gilbert, circuit judge.

In the Matter of SALTER D. WORDEN, on *Habeas Corpus.* No. 12381.

Order Granting an Appeal.

Now comes Geo. W. Montieth, Esq., attorney for petitioner, on behalf of Salter D. Worden, and moves the court for an order granting an appeal to the Supreme Court of the United States herein. Whereupon it was ordered that said motion be, and is hereby, granted and an appeal to the Supreme Court of the United States is hereby allowed.

20 *Order Allowing Appeal to the Supreme Court of the United States.*

In the Circuit Court of the United States in and for the Northern District of California.

In the Matter of SALTER D. WORDEN, on *Habeas Corpus.*

It appearing to the court that the petitioner herein and the said Salter D. Worden, in whose behalf this proceeding on *habeas corpus* has been instituted, *has* given due notice of appeal herein, as required by law, and have otherwise complied with the statutes in such cases made and provided—

It is hereby ordered that the appeal of the said petitioner, Geo. J. Crossley, and said Salter D. Worden, as appellants and plaintiffs in error therein, and against The State of California and Charles Aull, warden of the State prison *at* said State, as respondents and defendants in error, to the Supreme Court of the United States be, and the same is hereby, granted agreeable to the laws of the United States in such cases made and provided.

Done in open court this 3d day of June, 1897.

WILLIAM B. GILBERT, *Judge.*

(Endorsed:) Filed June 3rd, 1897. W. J. Costigan, clerk.

21 At a stated term, to wit, the March term, A. D. 1897, of the circuit court of the United States of America of the ninth judicial circuit in and for the northern district of California, held at the court-room, in the city and county of San Francisco, on Thursday, the 3rd day of June, in the year of our Lord one thousand eight hundred and ninety-seven.

Present: Honorable William B. Gilbert, circuit judge.

In the Matter of SALTER D. WORDEN, on *Habeas Corpus*. No. 12381.

Order Fixing Amount of Bond on Appeal.

Ordered that the bond on appeal to the Supreme Court of the United States herein be, and is hereby, fixed at the sum of $250.00, to be approved by Honorable William W. Morrow, circuit judge.

22 In the Circuit Court of the United States, Ninth Circuit, Northern District of California.

In the Matter of SALTER D. WORDEN, on *Habeas Corpus*.

Bond on Appeal.

Know all men by these presents that we, George J. Crossley, petitioner, on behalf of Salter D. Worden, as principal, and James H. Barry, —— ——, as sureties, are held and firmly bound unto the State of California and Charles Aull, warden of the State prison of the State of California, in the full and just sum of two hundred and fifty dollars, to be paid to the said State of California and the said Charles Aull, warden as aforesaid, their attorneys, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this thirs day of June, in the year of our Lord one thousand eight hundred and ninety-seven.

Whereas lately, at a session of the circuit court of the United States for the northern district of California, in a proceeding in said court, wherein application by George J. Crossley, petitioner on behalf of Salter D. Worden, for a writ of *habeas corpus*, said application was by the said circuit court denied and the petition therefor dismissed by an order of said court, and the said Crossley

23 and said Worden having obtained from said court an order allowing an appeal herein to reverse the said order denying said writ and dismissing said petition in the aforesaid court, and a citation directed to the said State of California and to said Charles Aull, warden as aforesaid, is about to be issued, citing and admonishing them to be and appear at a United States Supreme Court, to be holden at Washington, District of Columbia, on the fourth day of October, 1897, next:

Now, the condition of the above obligation is such that if the said Geo. J. Crossley and the said S. D. Worden shall prosecute said appeal to effect and shall answer all damages and costs that shall be awarded against them if they fail to make their plea good, then the above obligation to be void; else to remain in full force and virtue.

GEO. J. CROSSLEY. [SEAL.]
JAMES H. BARRY. [SEAL.]
JAMES TAYLOR ROGERS. [SEAL.]

UNITED STATES OF AMERICA,
Northern District of California, City and County of San Francisco, } ss:

James H. Barry and James Taylor Rogers, being duly sworn, each for himself deposes and says that he is a householder in said district and is worth the sum of two hundred and fifty dollars, exclusive of property exempt from execution and over and above all debts and liabilities.

JAMES H. BARRY.
JAMES TAYLOR ROGERS.

Subscribed and sworn to before me this 3d day of June, A. D. 1897.

WM. W. MORROW,
Judge of U. S. Circuit Court, Northern District of California.

24 (Endorsed:) Bond on appeal to Supreme Court of the United States. Form of bond and sufficiency of securities approved. Wm. W. Morrow, judge. Filed June 7, 1897. W. J. Costigan, clerk, by W. B. Beaizley, deputy clerk.

25 In the Circuit Court of the United States, Ninth Judicial Circuit, Northern District of California.

In the Matter of SALTER D. WORDEN, on *Habeas Corpus.*

Certificate to Transcript.

I, W. J. Costigan, clerk of the circuit court of the United States of America of the ninth judicial circuit in and for the northern district of California, do hereby certify the foregoing pages, numbered from 1 to 24, inclusive, to be a full, true, and correct copy of the record and proceedings in the above-entitled matter, and that the same together constitute the transcript of the record herein upon appeal to the Supreme Court of the United States.

In testimony whereof I have hereunto set my hand and affixed the seal of said circuit court this 30th day of June, A. D. 1897.

[Seal U. S. Circuit Court, Northern Dist. Cal.]

W. J. COSTIGAN,
Clerk United States Circuit Court,
Northern District of California.

26 UNITED STATES OF AMERICA, ss:

To the State of California and Charles Aull, warden of the State prison of the State of California, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, to be held at the city of Washington, in the District of Columbia, on the second day of August, A. D. 1897, pursuant to a notice of appeal and assignment of errors

duly served and filed in this circuit court and with the clerk of this court and in his office, in a certain action and appeal herein to the Supreme Court of the United States wherein George J. Crossley, petitioner on behalf of Salter D. Worden, and Salter D. Worden are appellants and plaintiffs in error and you are defendants in error, to show cause, if any there be, why the order of the said circuit court denying the application for a writ of *habeas corpus* and dismissing the petition therefor, as therein mentioned, should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the Honorable Wm. W. Morrow, judge of the circuit court of the northern district of California, this 18th day of June, A. D. 1897, and of the Independence of the United States the one hundred and twenty-first.

WM. W. MORROW,
Circuit Judge.

27 UNITED STATES MARSHAL'S OFFICE,
NORTHERN DISTRICT OF CALIFORNIA.

I hereby certify that I received the within citation on the 26th day of June, 1897, and personally served the same on the 28th day of June, 1897, on Charles Aull, warden of the State prison of the State of California, by delivering to and leaving with Charles Aull, warden of the State prison of the State of California, said defendant named therein, personally, at the county of Sacramento, in said district, a copy thereof.

BARRY BALDWIN,
U. S. Marshal,
By H. M. MOFFITT,
Office Deputy.

San Francisco, June 30th, 1897.

UNITED STATES MARSHAL'S OFFICE,
NORTHERN DISTRICT OF CALIFORNIA.

I hereby certify that I received the within citation on the 29th day of June, 1897, and personally served the same on the 29th and 30th days of June, 1897, on the State of California by delivering to and leaving with Jas. H. Budd, governor of the State of California, on said date, to wit, June 29th, 1897, and by delivering to and leaving with W. F. Fitzgerald, attorney general of the State of California, on June 30th, 1897, at the city and county of San Francisco, in said district, each a copy thereof.

BARRY BALDWIN,
U. S. Marshal,
By S. P. MONCKTON,
Office Deputy.

San Francisco, June 30th, 1897.

[Endorsed:] In the Supreme Court of the United States. Geo. J. Crossley and Salter D. Worden, plaintiffs in error, *vs.* The State of California and Charles Aull, warden, etc., defendants in error. Citation. Filed June 30th, 1897. W. J. Costigan, clerk U. S. circuit court, northern district of California.

Endorsed on cover: Case No. 16,683. N. California C. C. U. S. Term No., 470. George J. Crossley (petitioner on behalf of Salter D. Worden) and Salter D. Worden, appellants, *vs.* The State of California and Charles Aull, warden of the State prison of the State of California. Filed October 9, 1897.

No. 470.

Motion by appellees to advance

Filed Oct 14, 1897.

Supreme Court of the United States

OCTOBER TERM, 1897.

No. 470.

GEORGE J. CROSSLEY (PETITIONER ON BEHALF OF SALTER D. WORDEN) AND SALTER D. WORDEN, *Appellants*,

vs.

THE STATE OF CALIFORNIA AND CHARLES AULL, WARDEN OF THE STATE PRISON OF THE STATE OF CALIFORNIA, *Appellees*.

MOTION BY APPELLEES TO ADVANCE CASE FOR HEARING, NOTICE OF MOTION AND AFFIDAVIT.

W. F. FITZGERALD,
Attorney-General of California, and

W. H. ANDERSON,
Assistant Attorney-General of California, for Appellees.

LAW REPORTER PRINT, WASHINGTON, D. C.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1897.

No. 470.

GEORGE J. CROSSLEY (PETITIONER ON BEHALF OF SALTER D WORDEN) AND SALTER D. WORDEN, APPELLANTS,

vs.

THE STATE OF CALIFORNIA AND CHARLES AULL, WARDEN OF THE STATE PRISON OF THE STATE OF CALIFORNIA, APPELLEES.

Motion by Appellees to Advance the Case on the Docket and to have it set down for a particular day for Hearing.

Now come the State of California and Charles Aull, warden of the State Prison of the State of California, the appellees in the above-entitled case, and move the above-entitled court for an order advancing said case on the docket of said court, and setting the same down for hearing on a particular day. Said motion is made on the following facts and grounds:

1. This appeal is taken from an order of the United States Circuit Court of the Ninth Circuit in and for the Northern District of California, denying an application of the appellant Crossley, made on behalf of the appellant Worden, for a writ of *habeas corpus* directed to the appellee Aull. The

appellant Worden is under sentence of death upon judgment of conviction for murder in the first degree rendered by the Superior Court of the County of Yolo, State of California, and affirmed by the Supreme Court of said State, and, pending execution, is detained in custody by the appellee Aull, under and by virtue of said judgment of conviction and the laws of said State. The said judgment of conviction was rendered against said appellant on the 16th day of November, 1894. Its execution was delayed pending the appeal to the Supreme Court of said State; and is now being still further delayed pending this appeal.

2. The special and peculiar facts and circumstances existing as reasons for the advancement of this case on the docket of this court are as follows:

(*a*) That this is a case involving the prompt and orderly administration of the criminal laws of the State of California.

(*b*) That the appellant Worden has been convicted of murder in the first degree in one of the superior courts of the State of California, the judgment of conviction has been passed upon and affirmed by the highest judicial tribunal of that State, and this proceeding delays and thwarts the punishment of said appellant in accordance with the judgment pronounced against him by the courts of said State.

(*c*) That by virtue of the provisions of Section 766 of the Revised Statutes of the United States the appeal in this case prevents the prompt and orderly administration of the criminal laws of the State of California.

(*d*) That by reason of this proceeding, and others of a like character now on appeal to this court, the enforcement of the criminal laws of the State of California is hampered and thwarted; and the laws of that State for the administration of justice and the punishment of crime are rendered largely nugatory and are brought into derision and contempt.

(*e*) That, therefore, a speedy determination of this case by this court is in the interests of justice, law and order, and is

a matter of the utmost importance to the people of the State of California.

(*f*) That the Attorney General of the State of California is at present in Washington in attendance upon this honorable court in this and three other cases of a similar character, now on appeal to this court; that he is detained in Washington by this and the other cases referred to, and that he is thereby prevented from attending to the other official duties of his office requiring his presence in California.

3. The facts upon which the foregoing grounds for this motion are based will more fully appear from the transcript of the Record of the case on file and from the affidavit of W. H. Anderson, Assistant Attorney General of the State of California, attached hereto and filed herewith, and said Record and affidavit are hereby referred to and by such reference made a part of this motion.

W. F. FITZGERALD,
Attorney General of the State of California, and

W. H. ANDERSON,
Assistant Attorney General of the State of California,
For Appellees.

IN THE SUPREME COURT OF THE UNITED STATES.

October Term, 1897. No. 470.

GEORGE J. CROSSLEY (Petitioner on behalf of Salter D. Worden) and SALTER D. WORDEN, Appellants.

vs.

THE STATE OF CALIFORNIA and CHARLES AULL, Warden of the State Prison of the State of California, Appellees.

Affidavit of W. H. Anderson in support of motion to advance.

DISTRICT OF COLUMBIA, *ss:*

W. H. Anderson, being first duly sworn, doth upon oath depose as follows:

That he is the Assistant Attorney General of the State of California, and one of the counsel for the above-named appellees, and as such is fully conversant with all of the facts and circumstances connected with the proceedings against appellant Worden in the courts of the State of California and hereinafter mentioned and referred to, and with all the facts and circumstances connected with this proceeding; that appellant Worden was convicted in the Superior Court of the County of Yolo, State of California, of the crime of murder in the first degree; that judgment of conviction for the said crime was pronounced against him by said court on the 16th day of November, 1894, that he was therein and thereby sentenced to be hanged and pending the execution of said judgment he was therein and thereby ordered to be placed in the custody of the appellee Aull herein; that thereafter an appeal was taken by appellant Worden to the Supreme Court of the State of California from the said judgment of conviction and also from an order of the said Superior Court denying a motion made by him for a new trial; that after a thorough consideration of all the issues involved in said appeal the Supreme Court of the State of California, on the 29 day of June, 189 , rendered its judgment and filed its opinion affirming the said judgment and order of said Superior Court so appealed from; that pend-

ing said appeal the execution of said judgment of conviction was stayed by law; that thereafter, in due course of law, the said Superior Court made an order fixing a date for the execution of said judgment and directing the delivery of said appellant into the custody of said appellee for execution in accordance with the said judgment of conviction and the laws of the State of California; that thereupon said appellant was so delivered into and has ever since remained in the custody of said appellee; that the date so fixed by the said last-mentioned order for the execution of said judgment of conviction was the 4th day of June, 1897; that prior to said date so fixed, to wit, on the 3d day of June, 1897, appellant made the application to the Circuit Court of the United States, Ninth Circuit, in and for the Northern District of California, for a writ of *habeas corpus*, from the order denying which this appeal is ~~by him~~ prosecuted, and prior to the said 4th day of June, 1897, perfected this appeal; that by the provisions of Section 766 of the Revised Statutes of the United States, pending this appeal, all proceedings against the person of the defendant by the courts or officers of the State of California are declared to be null and void; that, therefore, the enforcement of the criminal laws of this State are thwarted and prevented by this case; that three other cases of a similar nature are now pending before this court in which the execution of three other persons convicted of murder in the courts of the State of California and sentenced to be hanged is being similarly delayed; and that an early determination of this case is in the furtherance of justice, in the interests of the administration of the criminal laws of the State of California, and is of the utmost importance to the people of said State.

Further this deponent sayeth not.

W. H. ANDERSON.

Subscribed and sworn to before me, this 14th day of October, 1897.

Oscar Lockett (Seal)

A Notary Public in and for the District of Columbia.

IN THE SUPREME COURT OF THE UNITED STATES.

October Term, 1897. No. 470.

GEORGE J. CROSSLEY (Petitioner on behalf of Salter D. Worden), and SALTER D. WORDEN, Appellants,

vs.

THE STATE OF CALIFORNIA, and CHARLES AULL, Warden of the State Prison of the State of California, Appellees.

Notice of Motion to Advance Case.

To GEORGE J. CROSSLEY and SALTER D. WORDEN, Appellants, and to ISAAC J. MACCABE and GEORGE W. MONTEITH, their Counsel:

You and each of you will please take notice that the appellees by their counsel, will, on the first Monday in November, 1897, at the opening of the Supreme Court of the United States on that day, or as soon thereafter as counsel can be heard, in the court room of said court, in the Capitol Building at Washington, District of Columbia, make and submit to the said court, the foregoing motion in writing (hereunto attached) to advance this case upon the docket of said court and to have it set down for a particular day for hearing. Said motion will be made upon the facts and grounds set forth in said written motion which is hereby referred to and by such reference made a part of this notice. There will be used upon the hearing of said motion and submitted therewith, the affidavit of W. H. Anderson, hereunto attached and the record on file with the clerk of said court in this case.

Respectfully,

W. F. FITZGERALD,
Attorney General of the State of California, and

W. H. ANDERSON,
Assistant Attorney General of the State of California,
For Appellees.

No. 470.

Motion Papers for Appls.

Filed Oct. 30, 1897.

FILED
OCT 30 1897
JAMES H. McKENNEY,
CLE

IN THE

Supreme Court of the United States

OCTOBER TERM, 1897.

No. 470.

GEORGE J. CROSSLEY (Petitioner on behalf of Salter D. Worden), and SALTER D. WORDEN, Appellants,

vs.

THE STATE OF CALIFORNIA AND CHARLES AULL, Warden of the State Prison of the State of California, Appellees.

Objections of Appellants to Appellees' Motion to Advance the Case on the Docket.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1897.

No. 470.

GEORGE J. CROSSLEY (Petitioner on behalf of Salter D. Worden), and SALTER D. WORDEN, Appellants,

vs.

THE STATE OF CALIFORNIA AND CHARLES AULL, Warden of the State Prison of the State of California, Appellees.

Objections of Appellants to Appellees' Motion to Advance the Case on the Docket.

Now comes George J. Crossley and Salter D. Worden, the appellants in the above-entitled case, and object to the motion herein made and filed to advance this cause upon the docket, and setting the same down for hearing on a particular day, on the following grounds, to-wit:

1. Because the said motion is misleading and is based upon an erroneous allegation of fact.

2. Because the immediate advancement of said case will under the circumstances of this case and of the appellants amount to a practical denial of justice, and will prevent the appellant Salter D. Worden from presenting his case so that it can be heard upon the merits thereof.

These objections are supported and based upon the affidavits of Geo. J. Crossley and Geo. W. Monteith herewith filed and hereunto attached, reference being hereby made thereto and said affidavits being made part of these objections.

And in making and filing these objections these appellants hereby consent to an advancement of this cause to any date after the 15th day of March, 1898, at which time they expect to be fully able to have their case ready for presentation to the court.

Wherefore, these appellants earnestly pray that this honorable court make no order advancing this case for hearing at an earlier date than the 15th day of March, 1898.

(Signed) Isaac J. Maccabee,
Attorney for Appellants.

Dated San Francisco, California, October 23d, 1897.

IN THE SUPREME COURT OF THE UNITED STATES.

October Term, 1897, No. 470.

GEORGE J. CROSSLEY (Petitioner on behalf of Salter D. Worden) and SALTER D. WORDEN, Appellants.

vs.

THE STATE OF CALIFORNIA and CHARLES AULL, Warden of the State Prison of the State of California, Appellees.

Affidavit of George J. Crossley in support of appellants' objections to motion to advance.

State of California, } ss.
City and County of San Francisco. }

George J. Crossley, being first duly sworn, upon his oath deposes and says:

That he is one of the appellants above-named; that ever since the commencement of this action in the Circuit Court, George W. Monteith, Esq., has been the counsel and attorney for the affiant and the other appellant, Salter D. Worden, the person in whose behalf this cause was instituted, and has been employed by the appellants to appear for them and represent them at the hearing of this cause when the same shall be finally heard by the Court; that appellants are both poor persons and wholly without means, and have been obliged to depend upon the generosity and assistance of the friends of appellant Worden to prosecute this case as far as it has gone, and will still be obliged to depend upon them and upon the brother of said Worden to raise the funds that are necessary to pay the costs and expenses of prosecuting this appeal; that the brother of the said Worden is located in Yokohama, Japan, and, as affiant is informed and believes, will be able to render part of the assistance necessary to prosecute this appeal, and furthermore affiant states that subscriptions are being taken up among the labor organizations and friends of Worden for the same

purpose; that affiant has good reason to believe and fully does believe that if a reasonable amount of time be afforded the appellants that they will be able to obtain whatever funds are necessary to prosecute the appeal herein, and fully present the same upon a hearing thereof, if such hearing be had at a time not earlier than the 15th day of March, 1898; that owing to the amount of time that will be necessary to secure the subscriptions required and to communicate with the brother of the said Worden, at least four or five months' time will be required.

That Isaac J. Maccabe, who appears as attorney for appellants, only temporarily represents them, and as he resides in San Francisco, California, cannot be present at the hearing of appellees' motion to advance noticed for November 1, 1897;

That appellants have taken this appeal in entire good faith and have been advised by their counsel, who has by them been fully informed as to the facts, that their appeal is well taken in point of law, and presents questions that will warrant the reversal of the judgment of the said Court;

That appellants have no desire to in any way retard or delay the prompt disposition of this case; but, on the contrary, are both willing and anxious to expedite its hearing so far as the same can be done without jeopardizing the material interests of the appellant Worden, which involve his life;

Wherefore, this appellant and affiant earnestly prays that if this Honorable Court in its judgment shall deem an advancement of the case just and proper, that the time of hearing be fixed at a date not earlier than the 15th day of March, 1898.

(Signed.) Geo. J. Crossley
One of the Appellants.

Subscribed and sworn to before me this 23d day of October, 1897.

(Signed.) Addie L. Ballou,
Notary Public in and for the City and County of San Francisco and State of California.

(Official Seal.)

State of California, }
City and County of San Francisco. } ss.

George W. Monteith, first being duly sworn, deposes and says: That he is the attorney and counsel of the appellants herein, who has appeared for and represented them up to the filing and docketing of this cause; that, although he is still their counsel, not having as yet been enrolled and admitted to the bar of the Supreme Court, has been unable to appear in that court in their behalf, and has been obliged to secure other counsel to temporarily represent them until he would be able to attend the Supreme Court, and be regularly admitted, affiant being fully qualified and entitled under the rules of the court upon proper motion and with the consent of the Court to be so admitted;

That affiant has charge of the interests of appellants, so far as it is now possible for him to attend to them, and knows all the facts and circumstances of the case, and being a regularly licensed attorney and counselor at law, practicing in and being admitted to all the courts of the state of California, the United States Circuit Court of Appeals and the United States Circuit Court, each of the Ninth Circuit, and fully qualified to judge thereof, has advised the appellants, and fully believes and is convinced, that the appeal herein is meritorious and well taken in point of law, and will warrant a reversal of the judgment of the Circuit Court:

That affiant has read the affidavit of W. H. Anderson in support of the motion to advance; that the same is erroneous in the following particulars, to-wit:

That while it is true that appellants have applied for habeas corpus herein, they also and at the same time applied for an ancillary writ of certiorari, the latter to be directed to the Superior Court of Yolo County, California, wherein lies the record in the case upon which the appellant Worden was convicted of murder, and was, for the purpose of bringing before the Circuit Court such record, in that defects of jurisdiction complained of, and because of which the writ of habeas corpus was sought were latent, and appeared upon the record of said Superior Court lying back of the judgment of that court, and not being patent upon the commitment by which the said Worden is held in custody, or

in the judgment it recites, required the added process of certiorari to bring the whole question of the unlawful custody on the part of the appellees complained of before the Circuit Court;

That, by reason of the laws of the State of California, under which appellant Worden was convicted, the crime of murder is divided into two degrees, to-wit, murder in the first degree and murder in the second degree; that section 189 of the Penal Code of the State of California, the law under which appellant Worden was convicted, reads as follows:

"Section 189. All murder which is perpetrated by means of poison, or lying in wait, torture, or by any other kind of willful, deliberate, and premeditated killing, or which is committed in the perpetration, or attempt to perpetrate, arson, rape, robbery, burglary, mayhem, is murder of the first degree; and all other kinds of murders are of the second degree."

That the facts, as they appear in the record of said Superior Court and in the bill of exceptions, which is a part thereof, show no evidence of any willful ,deliberate and premeditated intent to take human life; but that the malicious intent, as shown by said record ,is purely by implication of law and arising from the commission of a felony other than any of the five expressly by law made the basis of the crime of murder in the first degree.

That section 187 of said Penal Code defines murder as follows:

"Section 187. Murder is the unlawful killing of a human being with malice aforethought."

And section 188 of said Code says: "Such malice may be express or implied. It is express when there is manifested a deliberate intention unlawfully to take away the life of a fellow-creature. It is implied when no considerable provocation appears, or when the circumstances attending the killing show an abandoned and malignant heart."

That, by reason of the laws of California, aforesaid, murder in the first degree, other than that committed in the perpetration or attempt to perpetrate arson, rape, robbery, burglary, or mayhem, only occurs where the malice is express and not implied from the fact of the presence of a purpose or design to commit some other felony;

That appellant Worden, as appears in the record of said Superior Court, was shown to have so injured the track and roadbed

of a railroad that a train was derailed and the engineer was killed; but there is no evidence in the record showing any express purpose on the part of appellant Worden to take the life of said engineer, or of any other fellow-creature, and the only malice that could be determined by the facts as appear in the record of said Superior Court was implied malice, implied from the fact of the commission of a felony, to-wit, the wrecking or attempt to wreck a train; and under the law of California, therefore, the record of said Superior Court at most shows a case of murder in the second degree;

That, by the laws of California, murder in the second degree is punishable by imprisonment only, while murder in the first degree may be punished by death;

That, as it appears in the record of said Superior Court, the Court only submitted to the jury the question of murder in the first degree on the one hand, or acquittal on the other; that, by reason of such action on the part of said Superior Court, the jury returned a verdict of murder in the first degree, and appellant Worden was thereupon sentenced to be hanged, and by the appellee, the State of California, acting through its Superior Court aforesaid, placed in the custody of appellee Aull for the purpose of having him hanged by the neck until dead, and the custody of the said Worden is for that and no other purpose;

That appellant Worden appealed to the Supreme Court of the State of California in that behalf, and his appeal was denied; that he also made application to the Governor of said State for relief, which was refused, and that there is no relief which he can seek in the State of California, either in its courts or otherwise, which will prevent the State of California taking his life in a case wherein the facts, under the laws of said State, at most warrant his imprisonment;

That, by reason of the premises, the appellant Worden has been denied by the appellee, the State of California, of the equal protection of its laws, and has by said State been convicted and about to be deprived of his life through the unlawful custody in which he is held, without due process of law;

That the statement contained in the affidavit of the said W. H. Anderson, to-wit, "That there are three other cases of a similar nature now pending in this Court," is erroneous, in that

the questions presented by the other cases, as affiant is informed and believes, are wholly and radically different, and relate solely to such questions as can be raised upon and are patent from an examination of the commitment in each of the three cases referred to by the said Anderson;

That so far as affiant is informed and believes the three cases referred to by the said Anderson are those of one Durrant, one Allender and one Hill; and affiant is further informed and believes that the commitments in those cases are regular and present no patent defects of jurisdiction, and the appeals in those cases are, in truth, frivolous and without merit, while, in the case of appellant Worden, the appeal presents a plain and meritorious question under the 14th amendment of the Constitution of the United States, and is based upon latent defects of jurisdiction, which do not appear upon the face of the commitment but which he seeks to reach by the ancillary writ of certiorari in aid of that of habeas corpus.

That the affidavit of the said Anderson is misleading, erroneous and would, unless contradicted, tend to prejudice the appellant Worden before this Honorable Court, in that the statement in the affidavit of the said Anderson unchallenged might lead the Court to believe that the appeal of the said Worden was of the same frivolous and unwarranted character of the other appeals referred to;

That affiant earnestly and sincerely believes that the appeal of the appellants in this case is meritorious and entitles them to the relief they seek;

That it is the purpose of appellants to in good faith and as rapidly as possible bring this appeal on for hearing; but from his intimate knowledge of the circumstances and conditions of these appellants and of the case, he does not think it will be possible for them to fairly present their cause before the Supreme Court before the 15th day of March, 1898.

(Signed) Geo. A. Monteith

Subscribed and sworn to before me this 23rd day of October, 1897.

(Signed) Addie L. Ballou

Notary Public in and for the City and County of San Francisco and State of California.

(Official Seal)

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1897.

No. 470.

GEORGE J. CROSSLY (PETITIONER ON BEHALF OF SALTER D. WORDEN) AND SALTER D. WORDEN, APPELLANTS,

vs.

THE STATE OF CALIFORNIA, AND CHARLES AULL, WARDEN OF THE STATE PRISON OF THE STATE OF CALIFORNIA, APPELLEES.

Brief of Appellees Upon Their Motions to Dismiss the Appeal, and to Affirm the Order Appealed from.

STATEMENT OF CASE.

This an appeal from an order of the United States Circuit Court, Ninth Circuit, Northern District of California, denying an application made on behalf of appellant Worden, for a writ of *habeas corpus* directed to the appellee Aull.

The appellant, Salter D. Worden, was convicted in the Superior Court of the County of Yolo, State of California, of the crime of murder in the first degree, and was sentenced to be hanged. He appealed to the Supreme Court

of the State of California from the judgment of conviction, and from an order of the trial court denying his motion for a new trial. Both the judgment and order appealed from were affirmed.

People *vs.* S. D. Worden, 113 Cal. 569.

He is now in the custody of appellee Aull, pending and for execution under said judgment of conviction and by virtue of the process of said Superior Court, issued in accordance with said judgment of conviction and the laws of California.

Secs. 1217 and 1227, Penal Code of California.

Grounds of the Application.

The petition in this case presents but two alleged grounds for the issuance of the writ. They are as follows:

First. That Worden was convicted without due process of law, in this: that the evidence adduced against him at the trial was insufficient to sustain a verdict of murder in the first degree; that it would sustain no greater verdict than that of murder in the second degree; that it was the duty of the trial court, under the laws of California, to submit to the jury for its determination the question of the degree of murder of which the said Worden was guilty; and that the court—

> "only submitted to said jury the question as to whether or not Worden was guilty of murder in the first degree and would not and did not permit said jury to determine the question of the degree of murder therein or to find the said Worden guilty of murder in the second degree."

Second. That the crime of which Worden was convicted was one of which the State courts had no jurisdiction, but was an offense against the laws of the United States and exclusively cognizable in the Federal courts.

POINTS AND AUTHORITIES.

I.

The Alleged Denial to Worden of Due Process of Law.

In considering this portion of the petition for the writ, it is obvious:

First. That *if* the law of California required the submission to the jury of the question of the degree of Worden's crime, and *if* the trial court failed to so submit that question, the sole result was an error in that court's administration of the law of the State, and no defect in the law itself.

Second. That *if* the court did fail to submit to the jury the question of the degree of Worden's crime, the decision of the Supreme Court of the State sustaining the action of the lower court, shows conclusively that the law of California did not, under the circumstances developed in Worden's case, require the submission of this question to the jury.

Therefore, no Federal question is here presented.

If error was committed in the administration of the State laws, that constitutes no ground for Federal intervention. The writ of *habeas corpus* is not "a proceeding for the correction of errors."

In Re Fredericks, 149 U. S. 70, 75.
Ex Parte Parks, 93 U. S. 18.
Ex Parte Siebold, 110 U. S. 371.
Ex Parte Rowland, 104 U. S. 604, 612.
Ex Parte Yarborough, 110 U. S. 651.
Ex Parte Crouch, 112 U. S. 178.
In re Coy, 127 U. S. 731, 756.
Davis *vs.* Brawn, 133 U. S. 333.
In re Wood, 140 U. S. 278, 287.
In re Jugiro, 140 U S. 291, 297.
In re Tyler, 149 U. S. 164, 180.

In re Swan, 150 U. S. 637.
U. S. *vs.* Pridegen, 153 U. S. 48.
Anderson *vs.* Swartz, 156 U. S. 272, 276.
Bergeman *vs.* Backer, 157 U. S. 655, 659.
In re Belt, 159 U. S. 95.

On the other hand, the determination by the State Courts that no such error was committed is conclusive upon the Federal Courts. It is only where the State laws themselves are so defective as to violate or conflict with some provision of the Federal Constitution or laws, that the United States courts can intervene. Where, however, the State laws are free from objection their administration rests solely with the State courts.

Leeper *vs.* Texas, 139 U. S. 462, 467 and cases cited.
Bank of Hamilton *vs.* Dudley, 2 Peters, 493.
Gut *vs.* Minnesota, 9 Wall. 35.
Leavenworth *vs.* Barnes, 94 U. S. 70.
Railroad Company *vs.* Georgia, 98 U. S. 359, 365, 366.
Lincoln County *vs.* Lunning, 133 U. S. 529.
In re Duncan, 139 U. S. 449, 462.
Pittsburg C. C. & S. L. R. Co. *vs.* Backus, 154 U. S. 421.

The decision of the Supreme Court of California upon this particular phase of Worden's case is as follows:

> "The court prepared and gave to the jury three forms of verdict, and it is contended by appellant that in doing so the court erroneously neglected to give, as one form, 'guilty of murder in the second degree.' As to this matter the bill of exceptions shows that the judge said to the jury: 'There have been prepared for you, gentlemen, three blank forms of verdict which, by consent of counsel, you will be allowed to take to your juryroom;' also, that 'no objection was made by the defendant or his counsel

in response to such charge by the court relative to such forms of verdict, defendant's counsel remaining silent;' also, that 'no instruction was, upon the trial of this cause, requested by the defendant or his counsel as to what verdicts the jury could render or as to what constituted either the crime of murder in the first degree, murder in the second degree, or manslaughter, nor was the court requested by the defendant or his counsel to instruct the jury that it was within their province to find the defendant guilty of any lesser crime than the crime charged in the information.' Moreover, it is plain from the evidence introduced by appellant, and the instructions asked by him, that he presented his case entirely upon the theory that he did not do the appalling and most 'horrible' acts ascribed to him, and did not participate in such acts—not that the acts, if proven, would not constitute murder in the first degree. In the general charge the judge gave the statutory definition of murder in the second degree, and did not refuse any instruction asked upon the subject by appellant. Under these circumstances it was not the duty of the judge to affirmatively suggest to the jury that they might convict appellant of a lesser offense when not asked by appellant to do so, and when such suggestion apparently would have been against appellant's wishes; and no error was committed by not doing so."

People *vs.* Worden, 113 Cal. 574, 575.

II.

The Crime of which Worden was Convicted is not Exclusively or at all Cognizable by the Federal Courts.

It is alleged in the petition that Worden was convicted of the murder of one Samuel C. Clark, which murder was committed by derailing a train of which Clark was the engineer; that this train—

> "was not a regular freight or passenger train of the corporation, Southern Pacific Company, operating said piece of railroad above described, but was in

> truth and in fact a special train; that aside from its necessary crew of employees who were conducting the same, consisting of said Clark, as engineer, of a fireman, a conductor, two brakemen twenty-two United States soldiers and one other person, and that there was upon said train a considerable amount of United States mail which had been delayed in transmission, and that the effect of the derailment of said train, . . . constituted an obstruction or stopping of the transmission of the United States mail, and was a restraint and retarding of the interstate commerce of the United States,—that is to say, the commerce carried on between the State of California and other States of the Union—and that by reason thereof it appears from said record that the offense committed by said Worden was, if anything, an offense against the laws of the United States, and in contravention of the laws of the United States, and particularly of Sections 5440 and 3995 of the Revised Statutes of the United States, and of an Act of Congress of July 2, 1890, entitled 'An act to prevent Trusts and monopolies;'" and—

that the State of California—

> "assumed to try and did try the said Worden for an offense or by reason of an offense made solely punishable by the laws of the United States" (Rec. pp. 4 and 5).

It is further alleged in substance that the crime of which Worden was convicted was a murder of that character which was not the result of intention, but was "that murder which is due to the fact that by the commission of a felony the death of a person results;" that the felony from the commission of which the death in question resulted was not and could not have been a felony under the laws of the State of California but "was the commission of a crime or offense against the laws of the United States and in contravention of its statutes"—from which it is undoubtedly intended that the inference should follow that the resulting murder was

not a murder at all under the laws of California, although two courts of that State have so declared it (Rec., p. 5).

Then it is alleged that the train in question "was exclusively engaged in the carrying or transportation of the mail of the United States" and was guarded by Federal troops, pursuant to orders of the President of the United States (Rec., p. 5).

From all of this it is alleged—

> "that, therefore, it appears affirmatively from said record that the offense committed, if any offense was committed by the said Worden, was solely cognizable in the courts of the United States, who had and have exclusive jurisdiction thereof;"

and that the State courts acted without jurisdiction (Rec., pp. 5 and 6).

Section 5440 of the Revised Statutes of the United States, Title "Crimes," relates to the crime of conspiracy to commit an offense against or to defraud the United States.

Section 3995 of the Revised Statutes of the United States, Title "The Postal Service," relates to the crime of obstructing the mail.

By "An Act to Prevent Trusts and Monopolies" referred to in the petition is undoubtedly meant the Act of Congress of July 2, 1890, entitled "An Act to Protect Trade and Commerce Against Unlawful Restraints and Monopolies." (Supplement of Revised Statutes of the United States, Vol. I, Second Edition, pp. 762–764.) This act relates solely to contracts, combinations—"in the form of trusts or otherwise"—and conspiracies "in restraint of trade or commerce among the several States, or with foreign nations." Whether it has any bearing upon any of the crimes of which Worden became guilty by reason of his participation in the derailment of the train in question is immaterial, as neither it nor any of the Federal statutes cited relates in any way to the crime of murder, of which Worden was convicted.

The "Record" referred to in the petition is that of Worden's case in the Superior Court of Yolo County, California, where he was tried and convicted.

Section 753 of the Revised Statutes of the United States provides that:

> "The writ of *habeas corpus* shall in no case extend to a prisoner in jail, unless where he is in custody under or by color of the authority of the United States, or is committed for trial before some court thereof, or is in custody for an act done or omitted in pursuance of a law of the United States, or of an order, process or decree of court or judge thereof, or is in custody in violation of the Constitution or of a law or treaty of the United States; or, being a subject or citizen of a foreign state and domiciled therein, is in custody for an act done or omitted under any alleged right, title, authority, privilege, protection or exemption claimed under the commission, or order, or sanction of any foreign state or under color thereof, the validity and effect whereof depend upon the law of nations; or unless it is necessary to bring the prisoner into court testify."

Worden is "in jail." Therefore, unless those allegations of his petition under consideration bring his case within one or more of the special instances enumerated in the above quoted section, they present no ground for the issuance of the writ.

He is not under these allegations "in custody under or by color of the authority of the United States" or "committed for trial before some court thereof."

He is not, under these allegations, "in custody for an act done or omitted *in pursuance* of a law of the United States, or of an order, process or decree of a court or judge thereof."

He is not, under these allegations, "a subject or citizen of a foreign state."

It is not, under these allegations, necessary to bring him into court to testify.

Each of these propositions is too plain for argument.

Our inquiry then is narrowed down to one question: Is he, under the allegations which we are considering, "in custody in violation of the Constitution or of a law or treaty of the United States?"

The reasoning of the petitioner is evidently this: That Worden's crime was not murder; that it was either conspiracy to commit an offense against the United States (Section 5440, Revised Statutes U. S.), or obstructing the mails (Sec. 3995, Revised Statutes U. S.), or interfering with interstate commerce (Act of July 2, 1890), or either or all of them; that each of these offenses are offenses against the United States, not against the State of California, and are cognizable exclusively in the courts of the United States; and that, therefore, the State courts had no jurisdiction of any crime of which Worden was guilty, and his conviction of murder was without due process of law.

A.

Worden was Tried for a Breach of the State, not of the Federal Laws.

It is familiar law that an act may be both an offense against the laws of the United States and of a State; and that the same act may embrace two or more offenses.

Fox *vs.* The State of Ohio, 5 How. 410, 434.
United States *vs.* Marigold, 9 How. 560.
Moore *vs.* Illinois, 14 How., 13, 19, 20.
Ex Parte Siebold, 100 U. S. 371, 389, 391.
Cross *vs.* North Carolina, 132 U. S. 131, 139.
In Re Loney, 134 U. S. 372, 375.

A case directly in point is that of Cross *vs.* North Carolina, 132 U. S. 131, 139, *supra*. There the plaintiff in error, the President of a National Bank, and another, were convicted in the courts of North Carolina of forging a promissory note payable at the bank in question. The defendants filed a joint plea in abatement, contesting the jurisdiction of the

State court upon the ground, in substance, that the note forged was entered upon and in the books of the bank, and placed among its assets by the defendant—

> "with the intent to deceive the agent of the United States, to wit, the bank examiner of the United States, duly appointed to examine into the affairs of the bank."

In the opinion of this court (which was unanimous) it was said:

> "The plea in abatement was evidently drawn with reference to Section 5209 of the Revised Statutes, Title, National Banks. That section provides, among other things, that every president, director, cashier, teller, clerk, or agent of any association . . . who makes any false entry in any book, report or statement of the association, with intent, in either case, to injure or defraud the association or any other company, body politic or corporate, or any individual person, or to deceive any officer of the association, or any agent appointed to examine the affairs of any such association; and every person who, with like intent, aids or abets any officer, clerk, or agent, in any violation of this section, shall be deemed guilty of a misdemeanor and shall be imprisoned not less than five years nor more than ten.
>
> "It is contended that the courts of the United States have exclusive jurisdiction to try the defendants for having made the false entries on the books of the bank, with the intent stated in the plea; that the forgery in question is an integral, essential element in such entries, which were false only because based upon the forged notes; that the defendants cannot be tried for the false entries after being tried for the forgery; consequently, a recognition of the right of the State court to try them for the latter offense will defeat the jurisdiction of the Federal court to try them for the former offense. In other words, that where exclusive jurisdiction is given to the courts of the United States to try an offense, the State court cannot exercise jurisdiction in respect to

any particular act constituting an essential ingredient of that offense, although the commission of such act is made a crime against the State.

"The fallacy of this argument is in assuming that the offense described in Section 5209 of the Revised Statutes, namely, the making by an officer or agent of a national banking association of a false entry in its books, reports or statements, with intent to injure or defraud the association, or others, or with the intent to deceive its officers or any agent appointed to examine its affairs, necessarily involves the crime of forgery, of which the defendants were found guilty. If the notes in question had not been forged, but, with or without the consent of the obligors, had been temporarily placed by the defendant among the assets of the bank, and entered upon its books, when they were not its property, with intent to deceive the agent appointed to examine its affairs, they could have been punished under Section 5209. On the other hand, the crime defined in Section 1029 of the Code of North Carolina would have been complete, if the defendants simply made and forged, or willingly assented to the making or forgery of the notes described in the indictment, with intent to defraud, and did not follow it up by committing the crime against the United States of making false entries in respect thereto upon the books of the bank, with the intent to deceive the agent designated to examine its affairs. *The crime against the State could not be excused or obliterated by committing another and distinct crime against the United States.*"

And again:

"The argument in behalf of the plaintiffs in error fails to give effect to the established doctrine that the same act or series of acts may constitute an offense equally against the United States and the State, subjecting the guilty party to punishment under the laws of each government. This doctrine is illustrated in United States *vs.* Marigold, 9 How. 560, 569; Fox *vs.* Ohio, 5 How. 410, 433; Moore *vs.* Illinois, 14 How. 13, 19; and *Ex Parte* Siebold, 100 U.

S. 371, 390; in the first of which cases it was said that 'the same act might, as to its character and tendencies, and the consequences it involved, constitute an offense against both the State and Federal governments, and might draw to its commission the penalties denounced by either, as appropriate to its character in reference to each.' If it were competent for Congress to give exclusive jurisdiction to the Courts of the United States of the crime of falsely making or forging promissory notes, purporting to be executed by individuals, and made payable to or at a national bank, or of the crime of uttering or publishing as true any such falsely made or forged notes, it has not done so. Its legislation does not assume to restrict the authority which the States have always exercised of punishing in their own tribunals the crime of forging promissory notes and other commercial securities executed by private persons, and used for purposes of private business. The forgery of such instruments is none the less injurious to the welfare of the people of a State because they happen to be made payable to or at banking associations which come into existence under the authority of the United States. If the punishment by the State of the crime of forgery, of which the defendants were found guilty, leaves them exposed to punishment by the United States for having made false entries upon the books of the bank of which they were officers, with the intent to deceive the agent appointed by the general government to examine its affairs, it results from the fact that they are amenable to the laws of the United States, as well as of the State of North Carolina, and may be subjected to punishment for violating the laws of each government. The forgery may have been committed in order that the instrument forged might thereafter become the basis of false entries upon the books of the bank. But that circumstance cannot defeat the authority of the State, charged with the duty of protecting its own citizens, from punishing the forgery as, in itself, a distinct, separate offense committed within its limits and against its laws.

This case and the case at bar differ very slightly in principle, the only difference being that the attempt to bring Worden's offense within the exclusive jurisdiction of the Federal courts is less plausible than that made in the Carolina case.

Here, according to the petition itself, Worden's one act resulted in at least three offenses against the Federal laws—conspiracy, obstructing the mails, and interfering with interstate commerce. In addition to these, the courts of California have decided that the same act resulted in an infraction of the State laws, viz.: in the crime of murder.

As there are unobjectional laws upon the California statute books defining murder and prescribing its punishment, and as it is the exclusive right of each State through its own tribunals to administer its own laws and to determine whether or not they have in any given instance been violated, it is very evident that, so far as this portion of the petition is concerned, the application for the writ was properly denied.

B.

Furthermore, the Federal courts have no jurisdiction whatever over the crime for which Worden was tried and of which he was convicted.

Worden was tried for and convicted of murder.

> "The criminal jurisdiction of the courts of the United States is wholly derived from the statutes of the United States."
>
> Manchester *vs.* Massachusetts, 139 U. S. 240, 262.
> United States *vs.* Hudson, 7 Cranch, 32.
> United States *vs.* Coolidge, 1 Wheat. 416.
> United States *vs.* Beavans, 3 Wheat. 336.
> United States *vs.* Reese, 92 U. S. 214, 216.
> United States *vs.* Hall, 98 U. S. 343, 345.
> United States *vs.* Britton, 108 U. S. 199, 206.
> Jones *vs.* United States, 137 U. S. 202, 211.
> United States *vs.* Eaton, 144 U. S. 677, 687.

In United States *vs.* Reese et al., 92 U. S. 214, *supra*, the defendants were indicted in the United States Circuit Court for the District of Kentucky for refusing to receive and count at a municipal election in the State of Kentucky "the vote of William Gassen, a citizen of the United States, of African descent." This court, in an elaborate opinion delivered by Mr. Chief Justice Waite, decided that the circuit court properly sustained demurrers to the indictment, as Congress had not "as yet provided by 'appropriate legislation' for the punishment of the offense charged in the indictment." (Opinion, pp. 221, 222.)

In the course of the opinion it was said:

> "If Congress has not declared an act done within a State to be a crime against the United States, the courts have no power to treat it as such."
>
> (Opinion, p. 216), citing U. S. *vs.* Hudson, *supra*.

The other cases cited involve similar questions and are to the same effect.

Has Congress ever conferred upon the Federal courts jurisdiction over the crime of murder committed under the circumstances set out in the petition herein?

An examination of the Federal Statutes shows conclusively that it has not.

It is not pretended that Worden's claim to Federal jurisdiction is based upon any more substantial ground than the fact that the train of which the deceased Clark was engineer was, at the time of its derailment and Clark's resulting death, engaged exclusively in the transportation of mail and was under a guard of Federal troops acting in pursuance of orders from the President.

> "The jurisdiction vested in the courts of the United States in the cases and proceedings hereafter mentioned, shall be exclusive of the courts of the several States:

"First. Of all crimes and offenses cognizable under the authority of the United States; . . . "

Section 711, Revised Statutes United States, title, "The Judiciary."

The District Court shall have jurisdiction as follows:

"First. Of all crimes and offenses cognizable under the authority of the United States, committed within their respective districts, or upon the high seas, the punishment of which is not capital, except in the cases mentioned in section forty-four hundred and twelve, title 'Crimes;' . . . "

Section 536, Revised Statutes United States, title, "The Judiciary."

"The circuit courts shall have original jurisdiction as follows:

. . . . . .

"Twentieth. Exclusive cognizance of all crimes and offenses cognizable under the authority of the United States, except where it is or may be otherwise provided by law, and concurrent jurisdiction with the district courts of crimes and offenses cognizable therein."

Section 629, Revised Statutes United States, title, "The Judiciary."

"Every person who commits murder:

"First. Within any fort, arsenal, dockyard, magazine, or in any *place or district of country* under the exclusive jurisdiction of the United States;

"Second. Or upon the high seas, or in any arm of the sea, or in any river, haven, creek, basin, or bay, within the admiralty and maritime jurisdiction of the United States, and out of the jurisdiction of any particular State;

"Third. Or who, upon any such waters, maliciouly strikes, stabs, wounds, poisons, or shoots, at any other

> person, of which striking, stabbing, wounding, poisoning, or shooting, such other person dies, either on land or at sea, within or without the United States, shall suffer death."

These are the Federal laws relating to the Federal jurisdiction of murder. Obviously they do not include the murder of which Worden was guilty. Moreover, Section 5328 of the Revised Statutes of the United States, title, "Crimes," expressly provides that—

> "Nothing in this title shall be held to take away or impair the jurisdiction of the courts of the several States under the laws thereof;"

and, as we have seen, merely because an act constitutes an offense against the Federal laws, it by no means follows that the same act does not constitute an offense against and is not punishable under the laws of a State.

However, it is perfectly clear that the State and Federal jurisdiction of the crime of murder do not conflict at any point; for that crime is only congnizable in the Federal courts when the *place* where it is committed is *exclusively* within Federal jurisdiction, and without the jurisdiction of any of the States. An apparent exception to this rule may be found where a person is killed by an officer of the Federal Government in pursuance of his duty, Cunningham *vs.* Neagle, 135 U. S., p. 1; but this is not really an exception, as, in such cases, the courts proceed upon the theory that there has been no violation of a State law, the prisoner being—

> "in custody for an act done or omitted in pursuance of a law of the United States, or of an order, process, or decree of a court or judge thereof."
>
> Section 753, Revised Statutes United States.

The case of United States *vs.* Bevans, 3 Wheat. 336 (cited *supra*) defines the extent of the jurisdiction of Federal courts in murder cases, and is directly in point here.

In that case the defendant, William Bevans, was indicted for murder, in the United States Circuit Court for the District of Massachusetts.

> "At the trial, it appeared in evidence, that the offense charged in the indictment was committed by the prisoner . . . on board the United States ship of war Independence, rated a ship of the line of seventy-four guns, then in commission, and in the actual service of the United States, under the command of Commodore Bainbridge. At the same time, William Bevans was a marine, duly enlisted, and in the service of the United States, and was acting as sentry, regularly posted on board of said ship, and Peter Leinstrum (the deceased, named in the indictment) was, at the same time, duly enlisted, and in the service of the United States as cook's mate on board of said ship. The said ship was, at the same time lying at anchor, in the main channel of Boston harbor, in waters of a sufficient depth, at all times of tide, for ships of the largest class and burden, and to which there is at all times a free and unobstructed passage to the open sea or ocean."

Chief Justice Marshall, who delivered the unanimous opinion of this court, said:

> "The indictment appears to be founded on the 8th section of the 'Act for the punishment of crimes against the United States.' . . .
>
> "To bring the offense within the jurisdiction of the courts of the Union, it must have been committed in a river, &c., out of the jurisdiction of any State. It is not the offense committed, *but the bay in which it is committed*, which must be out of the jurisdiction of the State. If, then, it should be true, that Massachusetts can take no cognizance of the offense; yet, unless the place itself be out of her jurisdiction, Congress has not given cognizance of that offense to its courts. *If there be a common jurisdiction the crime cannot be punished in the courts of the Union.*"

United States *vs.* Bevans, 3 Wheat., pp. 386, 387.

The opinion then enters into a thorough consideration of the question, and concludes:

> "Upon these reasons the court is of opinion, that a murder committed on board a ship of war lying within the harbor of Boston, is not cognizable in the Circuit Court for the District of Massachusetts; which opinion is to be certified to that court." (Opinion, p. 291.)

See also United States *vs.* Wiltberger, 5 Wheat. 76.

If the fact that the murder was committed on board of a Federal man-of-war by a marine in the active service of the United States Government did not serve to confer jurisdiction upon the Federal courts, certainly the fact that the murder in this case resulting from the derailing of a train carrying United States mail under an escort of Federal soldiers would not serve to confer such jurisdiction. Neither Worden nor the deceased Clark was in any way connected with the Federal Government; and the murder was obviously an offense against the laws of California, and has been conclusively so determined by the California courts.

III.

It was discretionary with the circuit court to deny the application for a writ of habeas corpus without determining the merits of the points involved.

This court has, and the circuit court had, judicial knowledge of the fact that Worden has availed himself "of his right to have the action of the trial court reviewed in the highest court of the State."

In re Wood, 140 U. S. 278, 286.

Furthermore, it affirmatively appears from the petition that the Record of the trial court would show all of the

matters alleged in the petition. In fact, the petition is based solely upon what it is claimed that the Record would show, and in addition to the prayer for the writ of *hebeas corpus* it contains a prayer for the issuance of a writ in the nature of *certiorari*, to compel the Superior Court of Yolo County, California, to certify said Record to the United States Circuit Court, there to be used for the purpose of substantiating the allegations of the petition.

It follows that the questions presented by this appeal could and should have been presented to the State courts for determination; and if determined contrary to the contention of appellants, could and should be brought up to this court by writ of error. Under such circumstances the Federal courts may, in their discretion—

> "require the prisoner to seek a review by writ of error instead of resorting to the writ of *habeas corpus*; and except in extraordinary cases presenting special and peculiar facts and circumstances, it is the better and usual practice to do so."

In re Frederick, 149 U. S. 70.
Ex Parte Royall, 117 U. S. 241.
In re Wood, 140 U. S. 278, 290.
New York *vs.*. Eno, 155 U. S. 100.
Pepke *vs.* Cronan, 155 U. S. 100.
In re Belt, 159 U. S. 95, 100.
Whittier *vs.* Tomlinson, 160 U. S. 231, 242.

The order appealed from should be affirmed.

Respectfully submitted.

W. F. FITZGERALD,
Attorney-General of California, and
W. H. ANDERSON,
Assistant Attorney-General of California,
For Appellees.

CROSSLEY *v.* CALIFORNIA.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF CALIFORNIA.

No. 470. Submitted December 14, 1897. — Decided January 3, 1898.

In a trial before a state court for murder charged to have been committed within the State, it is for the state court to decide whether the question of whether the evidence tended to show that the accused was guilty of murder only in the second degree shall or shall not be submitted to the jury, and its decision is not subject to revision in the Circuit Court of the United States, nor here.

A writ of *habeas corpus* cannot be made use of as a writ of error.

While the derailment of a train carrying the mails of the United States is a crime which may be punished through the courts of the United States under the provisions of the statutes in that behalf, the death of the engineer thereof produced thereby, is a crime against the laws of the State in which the derailment takes place, for which the person causing it may be proceeded against in the state court through an indictment for murder.

THE case is stated in the opinion.

No appearance for appellants, and no brief filed for them.

Mr. W. F. Fitzgerald and *Mr. W. H. Anderson*, for appellees, submitted on their brief.

MR. CHIEF JUSTICE FULLER delivered the opinion of the court.

Worden was convicted in the Superior Court of the county of Yolo, California, of the crime of murder in the first degree, and sentenced to be hanged. The Supreme Court of Cali-

fornia affirmed the judgment. *People* v. *Worden*, 113 California, 569.

Being in custody, awaiting execution, an application for the writ of *habeas corpus* was made on behalf of Worden to the Circuit Court of the United States for the Northern District of California, the application denied, and the petition dismissed. The case was then brought to this court.

Two grounds were relied on as justifying the issue of the writ.

First. That there was no evidence that Worden was guilty of murder in the first degree; that the evidence showed, or tended to show, that he was guilty, at most, of murder in the second degree; and that the trial court only submitted to the jury the question as to whether or not he was guilty of murder in the first degree. This was matter of error, and with its disposition by the highest tribunal of the State, it was not within the province of the Circuit Court to interfere. Nor can the writ of *habeas corpus* be made use of as a writ of error.

Second. That the state courts had no jurisdiction because Worden was convicted of the murder of one Clark, committed by derailing a train of which Clark was the engineer; that this was a special train "exclusively engaged in the carrying or transportation of the mail of the United States;" that the effect of the derailment "constituted an obstruction or stopping of the transmission of United States mail, and was a restraint and retarding of the interstate commerce of the United States;" that he, therefore, was guilty, if at all, of offences against the laws of the United States, (§§ 5440, 3995, Revised Statutes; Act July 2, 1890, c. 647, 26 Stat. 209,) and that any offence committed by him was solely cognizable in the courts of the United States.

But it is settled law that the same act may constitute an offence against the United States and against a State, subjecting the guilty party to punishment under the laws of each government; and may embrace two or more offences. *Cross* v. *North Carolina*, 132 U. S. 131, and cases cited. And see *Teal* v. *Felton*, 12 How. 284, 292.

Syllabus.

There is no statute of the United States under which Worden could, on the alleged facts, have been prosecuted for murder in the courts of the United States. He was convicted of that crime in the administration of the laws of California, Penal Code, Cal. §§ 187, 188, 189; §§ 17, 587; and the conviction has been sustained by the highest court of the State.

As indicating that the prosecution was in the ordinary course, the language of that court in the opinion delivered on affirming the judgment may not improperly be quoted. Among other things the court said: "The charge fully informed the jury that an intent to take human life is a necessary element of murder in the first degree. They were told that in order to convict the appellant of murder in the first degree they must be convinced beyond a reasonable doubt that the appellant, either personally or in concert with others, killed the deceased with malice aforethought by some kind of wilful, deliberate and premeditated killing, and that 'in order to constitute murder in the first degree, the intent to kill must be the result of deliberate premeditation.' This principle was given to the jury in various forms; and it is beyond question that the evidence abundantly warranted the jury in finding the appellant guilty of murder in the first degree — murder of a most aggravating and shocking character. There was an unnecessary allusion to the fact that the derailing of a train is a felony; but that in no way changed the general nature of the charge." 113 California, 569, 576.

No ground existed on which the Circuit Court could have held these proceedings void, and the writ was properly denied.

Order affirmed.